Supreme Court, U.S.
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No. 01-1384

In the Supreme Court of the United States

MICHIGAN PEAT, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether Section 404 of the Clean Water Act, 33 U.S.C. 1344, and regulations promulgated thereunder, direct the transfer of permitting authority to the United States Army Corps of Engineers when an authorized State fails to issue a permit that satisfies objections timely communicated to the State by the Environmental Protection Agency.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is unreported. The opinions of the district court (Pet. App. 3a-9a, 10a-19a) are unreported. A prior opinion of the court of appeals in this case (Pet. App. 20a-32a) is reported at 175 F.3d 422. A prior opinion of the district court is reported at 7 F. Supp. 2d 896.

JURISDICTION

The judgment of the court of appeals was entered on September 18, 2001. A petition for rehearing was denied on November 16, 2001 (Pet. App. 33a-34a). On February 5, 2002, Justice Stevens extended the time within which to file a petition for certiorari to and including March 18, 2002 (Pet. App. 35a), and the

petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, as amended, Pub. L. No. 95-217, 91 Stat. 1566 (33 U.S.C. 1251 *et seq.*) (Clean Water Act or CWA), "to restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). The Act prohibits the discharge of any pollutant from a point source into "navigable waters" except in accordance with the Act. 33 U.S.C. 1311(a); see 33 U.S.C. 1362(6) (Supp. V 1999), (7) and (12) (defining "pollutant," "navigable waters," and "discharge of a pollutant"). Section 404(a) of the Act authorizes the Secretary of the Army, acting through the United States Army Corps of Engineers (Corps), to "issue permits * * * for the discharge of dredged or fill material into the navigable waters at specified disposal sites," subject to the terms and procedures set forth in the CWA. 33 U.S.C. 1344(a).

The CWA provides that "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources." 33 U.S.C. 1251(b). Consistent with that policy, the CWA allows the States to assume the primary role of administering several of the permitting programs established by the Act, including the Section 404 permitting program, subject to continuing federal oversight. 33 U.S.C. 1344. The Act provides that "[t]he Governor of any State desiring to administer its own individual and general

permit program for the discharge of dredged or fill material into" particular categories of navigable waters may submit to the Environmental Protection Agency (EPA) "a full and complete description of the program it proposes to establish and administer under State law." 33 U.S.C. 1344(g)(1). If EPA determines that the state program satisfies the statutory criteria, see 33 U.S.C. 1344(g), EPA shall approve the program and so notify the State. 33 U.S.C. 1344(h)(2)(A).[1]

Even where a state-administered program is in effect, the EPA retains substantial oversight and enforcement responsibilities. The Act requires the administering state agency to transmit to EPA "a copy of each permit application received by such State and provide notice to [EPA] of every action related to the consideration of such permit application, including each permit proposed to be issued by such State." 33 U.S.C. 1344(j). EPA is in turn directed to forward the application to the Corps and to the Fish and Wildlife Service, an agency within the Department of the Interior. 33 U.S.C. 1344(j). If EPA intends to submit written comments to the State with respect to the permit application, it must so notify the State within 30 days after receipt of the permit application and must provide the written comments not later than 90 days after the date of such receipt. 33 U.S.C. 1344(j). If EPA submits a timely objection to the issuance of the proposed permit, a State "shall not issue the proposed permit" unless the State "modifies such proposed permit in accordance with [EPA's] comments." 33 U.S.C. 1344(j).

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[1] EPA regulations concerning the submission and approval (or disapproval) of State-submitted CWA Section 404 programs are published at 40 C.F.R. 233.10-233.16. See also 40 C.F.R. 233.53 (withdrawal of approval).

The State retains authority to issue the permit so long as it modifies the proposed permit to meet EPA's concerns within the time limitations set out in 33 U.S.C. 1344(j). If EPA's objections cannot be resolved, however, the State may not issue the permit. In that situation, permitting authority as to that permit reverts to the Corps of Engineers, by operation of law.[2] See *Friends of Crystal River* v. *United States EPA*, 35 F.3d 1073, 1075 (6th Cir. 1994).

EPA's regulations regarding permit applications submitted under a state-administered Section 404 permitting program, and regarding federal oversight of such permit applications, are published at 40 C.F.R. 233.30-233.38 and 233.50-233.51. Those regulations provide that, in the absence of EPA objections, a State-issued permit "becomes effective when it is signed by the Director [of the pertinent state agency] and the applicant." 40 C.F.R. 233.35(b)(1). The regulations further provide that "[i]n the event that the Director [of the pertinent state agency] neither satisfies EPA's objections or requirement for a permit condition nor denies the permit, the Secretary [of the Army] shall process the permit application." 40 C.F.R. 233.50(j).

Michigan and New Jersey are the only two States with approved CWA Section 404 permitting programs. See 40 C.F.R. 233.70, 233.71. The approved Michigan Section 404 permitting program appears at 40 C.F.R.

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[2] "In any case where [EPA] objects to the issuance of a permit, on request of the State, a public hearing shall be held by [EPA] on such objection. If the State does not resubmit such permit revised to meet such objection within 30 days after completion of the hearing or, if no hearing is requested within 90 days after the date of such objection, the Secretary [of the Army] may issue the permit * * * in accordance with the guidelines and requirements of [the Act]." 33 U.S.C. 1344(j).

233.70. Section 233.70 provides that "[t]he applicable regulatory program for discharges of dredged or fill material into waters of the United States in Michigan * * * is the program administered by the Michigan Department of Natural Resources [DNR]." The State recently transferred the responsibility for administering its Section 404 program from the DNR to its Department of Environmental Quality (DEQ). 62 Fed. Reg. 61,173 (1997).

2. Petitioner Michigan Peat conducts business activities that involve the mining of peat from wetlands parcels situated near Minden, Michigan. Pet. App. 24a. The company owns or controls two wetlands parcels, referred to as Minden North and Minden South, that are situated within a wetlands area known as the Minden Bog. *Ibid.*[3] In 1991, petitioner applied to the DNR for a permit that would authorize the company to discharge dredged or fill materials and to conduct related activities in the Minden tracts. C.A. App. 209. That application was subsequently withdrawn to allow the company additional time to complete the necessary environmental assessment studies. *Ibid.* On Septem-

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[3] Minden Bog is described as follows in DNR's March 21, 1995, report prepared in response to Michigan Peat's 1994 permit application:

> Minden Bog is a rare and irreplaceable wetland ecosystem which has significant ecological and scientific value. It is located in Sanilac County, where approximately 78 percent of the wetlands which existed prior to European settlement have been lost, along with wetland functions such as flood storage, wildlife habitat, and groundwater recharge. Currently, the Minden Bog includes about 4000 acres on State and private land, of which about 3200 acres exists in a natural and undisturbed condition.

C.A. App. 207.

ber 19, 1994, Michigan Peat again submitted a permit application to DNR. *Id.* at 308.

In December 1994, after obtaining comments from the Corps and the Fish and Wildlife Service, EPA formally notified DNR that EPA objected to petitioner's application. C.A. App. 74, 97. DNR and EPA subsequently conducted numerous discussions to address EPA's concerns. *Id.* at 97. Those discussions resulted in a revised draft permit that would have restricted peat mining to previously disturbed areas in Minden North and ensured that additional wetland losses in the Minden Bog complex were avoided. *Ibid.* The proposed permit would also have required the company to reclaim all 830 previously disturbed acres to wetlands after mining, without regard to the date when mining had first occurred. *Ibid.* By letter dated March 21, 1995, EPA advised DNR that EPA was withdrawing its objections. *Ibid.* That letter stated in part:

> The State's draft permit effectively addresses concerns previously raised by EPA and, on that basis, I am withdrawing our objection in accordance with provisions of 40 CFR 233.50(j), *on condition that the final permit not differ materially from this draft. If there are substantive changes to this draft decision by MDNR, we would need to review these changes to determine whether or not they are material to us.*

Ibid. (emphasis added).

On March 21, 1995, DNR tendered a proposed permit to petitioner. C.A. App. 98; see Pet. App. 25a. That permit stated that "[a]pproximately 749 acres of bog were disturbed prior to passage of" the State's wetlands protection law and that "[t]hese areas [of the Minden North tract] do not require a permit from the Michigan Department of Natural Resources to continue

the peat mining activity." C.A. App. 104. The tendered permit would also have authorized peat extraction activities within an additional previously disturbed area of approximately 202 acres of the Minden North tract, subject to certain conditions and restrictions (including requirements for reclamation of all disturbed areas of the bog without regard to when mining had commenced on them). See *id.* at 101, 106. The tendered permit would not have authorized activities on the remaining portions of the north parcel and would have denied authorization as to the entire south parcel. *Id.* at 101-102. Finally, the tendered permit stated that the "permit shall become valid on the date of signature by the permittee." *Id.* at 111; see also *id.* at 101 (DNR cover letter states that "[t]his permit is not valid until it is signed by the permittee").

3. Petitioner did not sign and return the tendered permit. Instead, petitioner initiated a state administrative appeal in "an effort to change the limitations and conditions of the draft permit." Pet. App. 4a; see *id.* at 26a. Petitioner also filed an action against the State in the Michigan Court of Claims, alleging that the denial of its permit request with regard to the undisturbed portions of the properties effected a taking of property that required the payment of just compensation. C.A. App. 21; Pet. App. 26a-27a.

4. On May 16, 1997, petitioner filed suit in federal district court against EPA and other federal parties. Pet. App. 28a. Petitioner sought, *inter alia*, a declaration that its operations were in full compliance with CWA Section 404. *Ibid.* On June 6, 1997, DEQ issued Permit No. 94-8-342, which authorized petitioner to extract peat on 2819 acres of the company's Minden parcels, subject to certain restrictions and limitations. C.A. App. 123. That permit stated, however, that

"ISSUANCE OF THIS PERMIT DOES NOT AUTHORIZE ANY WORK UNDER THE AUTHORITY OF THE FEDERAL CLEAN WATER ACT. Any work initiated on this project without required Section 404 approval may be considered a violation of Federal law." *Ibid.*; see Pet. App. 27a. The cover letter that accompanied the permit stated that, because of EPA's continuing objections, DEQ was "precluded by federal law from authorizing this project under Section 404 of the Clean Water Act" and that petitioner could "seek federal authorization for the project directly from the U.S. Army Corps of Engineers, Detroit District." C.A. App. 173.

By letter to DEQ dated June 18, 1997 (C.A. App. 132-133), EPA "observed that the state permit differed greatly from the proposed [May 1995] Section 404 permit," and noted that EPA "had objected to earlier proposals to authorize certain activities encompassed in the new state permit." Pet. App. 27a. The letter also stated that "[a] final permit issued by the MDNR on March 21, 1995 was rejected by [petitioner] and has never become effective." C.A. App. 132. EPA advised DEQ that because it had failed to issue a final permit that satisfied EPA's objections, "pursuant to Section 404(j) of the CWA and 40 C.F.R. § 233.50(j), authority to process [petitioner's] permit application has been transferred by operation of law to the U.S. Army Corps of Engineers." *Id.* at 133. On June 23, 1997, the Corps advised petitioner that the State's CWA Section 404 permitting authority with regard to the Minden parcels had been transferred to the Corps. *Id.* at 175. The Corps further informed the company that "[t]he processing of a federal Section 404 permit by the Corps will begin upon the Corps' receipt of a complete application from you." *Ibid.*

Petitioner thereafter amended its complaint in the suit against the federal defendants to add DEQ, its director, and the State of Michigan as defendants, and to assert additional claims. The district court dismissed the claims against the state defendants based on Eleventh Amendment immunity, and it dismissed the claims against the federal defendants for lack of subject-matter jurisdiction. *Michigan Peat* v. *Regional Adm'r of Region V of the United States EPA*, 7 F. Supp. 2d 896 (E.D. Mich. 1998); see Pet. App. 28a-29a. The court of appeals affirmed the judgment of the district court with respect to the claims against the state defendants, but reversed the district court's dismissal of petitioner's claims against the federal defendants. *Id.* at 20a-32a. The court found that EPA's conditional withdrawal of objections to the proposed 1995 permit constituted "final agency action" subject to review in federal court. *Id.* at 29a-30a. The court remanded the case to the district court for further proceedings. *Id.* at 32a.

5. On remand, the district court ruled in favor of the federal defendants (respondents in this Court). In an opinion dated January 24, 2000, the court entered partial summary judgment for the respondents. Pet. App. 10a-19a. The court rejected petitioner's contention that the Corps had acted improperly by assuming regulatory authority over petitioner's CWA Section 404 application after the DEQ had granted a "state-only" permit. *Id.* at 16a-17a. The court observed that "under § 404(j) of the CWA [33 U.S.C. 1344(j)] the authority to issue § 404 permits is transferred from a state back to the Corps as a matter of law wherever a state has failed within the time prescribed by law to amend its proposed permit to conform to objections raised by the EPA." *Id.* at 16a. The court then explained:

> While it is true that the State here did satisfy the EPA's objections during the 90 day period as to the March 1995 permit, and only later issued the state-only permit which failed to conform to the EPA's objections, there is no compelling reason to bar the transfer of authority beyond this 90 day period. The state-only permit constituted a second permit decision.

Ibid. The district court stated that petitioner "had the right to administratively appeal MDEQ's decision" to impose conditions in the March 1995 proposed permit, "and MDEQ had the authority to issue a state-only permit." *Id.* at 17a. The court observed, however, that "[n]one of this changes the provision under 40 C.F.R. § 233.[5]0 that if the state does not satisfy the EPA's objections or deny the permit, authority to process the § 404 permit is transferred to the Corps." *Ibid.* The court reserved for further proceedings the question whether the EPA's withdrawal of objections to the March 1995 proposed permit conferred upon petitioner an entitlement to harvest the 749 acres that had first been disturbed before the passage of the state wetlands protection law. *Id.* at 12a-15a, 19a; see pp. 6-7, *supra.*

Approximately one year later, the district court decided the question, reserved in its January 2000 opinion, concerning the status of the 749 acres. Pet. App. 3a-9a. The court rejected petitioner's contention that the court of appeals' decision on the earlier appeal had established that those acres were not subject to federal regulation. The court explained that the prior Sixth Circuit decision "simply said that the sign-off by the [EPA] on the draft permit was final agency action and that this Court had subject matter jurisdiction. The

Court of Appeals did not comment on the merits of the complaint." *Id.* at 4a. The court further observed:

> EPA's final agency action was merely to agree to the text of the draft permit. The draft permit, however, was subject to limitations and conditions. If any limitation or condition of the draft permit was changed, there was no longer agreement on the part of EPA. [Petitioner's] refusal to sign the draft permit effectively meant that there was no permit.
>
> [Petitioner's] administrative appeal under [state law] is an effort to change the limitations and conditions of the draft permit. If [petitioner] is successful in the administrative appeal, the end result will be a recommendation to the director of [the DEQ]. If the director accepts any changes recommended through the administrative proceeding, the permit which issued will contain different limitations and conditions than those to which EPA consented. Effectively, [petitioner] will not have a valid permit because EPA did not * * * approve it. The refusal to sign the draft permit vitiated the EPA's consent.

Id. at 4a-5a. The district court concluded that "[t]here is nothing in the Clean Water Act, 33 U.S.C. § 1251, *et seq.*, or in the delegation to the state under section 404(a), 40 C.F.R. § 233.70, to exempt from regulation the 749 acres." *Id.* at 6a.

6. The court of appeals affirmed. Pet. App. 1a-2a. Petitioner did not challenge the district court's ruling that authority to issue a CWA permit was legally transferred to the Corps of Engineers when the State elected to include, in the "state-only" permit, provisions that were inconsistent with EPA's previously stated objections. Petitioner instead contended that the dis-

trict court's decision on remand was inconsistent with the court of appeals' earlier ruling, which petitioner characterized as a binding determination that the 749 acres were exempt from regulation under the Clean Water Act. See Pet. C.A. Br. 22-28; Pet. App. 2a. The court of appeals stated: "We have reviewed the reasoning of the district court and now AFFIRM." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 14) that "the Sixth Circuit's decision conflicts with decades of this Court's precedent holding that government agencies must strictly follow their procedural rules." That argument is without merit. Nothing in the court of appeals' decision suggests that the court viewed the Corps or EPA as having breached any pertinent federal regulation, or that the court would have condoned such a breach. Indeed, petitioner did not argue in the court of appeals that any violation of agency rules had occurred. The petition for certiorari should therefore be denied.

1. The court of appeals simply stated: "We have reviewed the reasoning of the district court and now AFFIRM." Pet. App. 2a. In arguing that the court of appeals condoned an EPA violation of the agency's own rules, petitioner relies primarily (see Pet. 19, 22) on the district court's statement that "there is no compelling reason to bar the transfer of authority [from state to federal officials] beyond this 90 day period." Pet. App. 16a. Petitioner characterizes that statement as an indication that "the courts below saw 'no compelling reason' for EPA to follow its controlling regulations." Pet. 22. Careful examination of the relevant passage, however, makes clear that petitioner has misread the district court's opinion.

In holding that the Corps had properly assumed regulatory authority over petitioner's CWA Section 404 application after the DEQ granted a superseding "state-only" permit, the district court explained:

> While it is true that the State here did satisfy the EPA's objections during the 90 day period as to the March 1995 permit, and only later issued the state-only permit which failed to conform to the EPA's objections, there is no compelling reason to bar the transfer of authority beyond this 90 day period. *The state-only permit constituted a second permit decision.*

Pet. App. 16a (emphasis added). As the italicized language makes clear, this passage does not suggest that EPA or the Corps may ignore the requirement, stated both in the governing regulations and in 33 U.S.C. 1344(j) itself, that EPA must raise any objections to a permit application filed with state authorities within 90 days after EPA receives the application from the State. Rather, the district court held that permitting authority had been transferred from DEQ to the Corps in June 1997, notwithstanding the expiration of "the 90 day period as to the March 1995 permit," because "[t]he state-only permit constituted a second permit decision." Pet. App. 16a. The thrust of the district court's analysis was that the transfer of authority occurred by operation of law when DEQ issued a permit that did not conform to EPA's previously stated objections. See *ibid.* (district court notes that "under § 404(j) of the CWA [33 U.S.C. 1344(j)] the authority to issue § 404 permits is transferred from a state back to the Corps as a matter of law wherever a state has failed within the time prescribed by law to amend its proposed permit to conform to objections raised by the EPA"). As we

explain below (see pp. 14-16, *infra*), that conclusion is correct. But even if the district court's analysis were open to question, there would be no basis for inferring that the court deliberately condoned an agency breach of its own regulation.

2. The fact that petitioner failed to present its current arguments to the court of appeals provides an independent reason for this Court to deny review. In the court of appeals, petitioner did not cite *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954); petitioner did not contend that the district court had countenanced an agency's breach of its own regulation; indeed, petitioner did not even contend that a breach of agency rules had occurred. This Court ordinarily does not consider issues neither raised before nor considered by the court of appeals. See, *e.g.*, *Pennsylvania Dept. of Corrs.* v. *Yeskey*, 524 U.S. 206, 212-213 (1998) (collecting cases). In addition, petitioner's failure to allege in the court of appeals that the agency had breached its own rules further undermines petitioner's current contention that the Sixth Circuit implicitly authorized such an agency violation.

3. In contending that "EPA ignored the strictures of its governing regulations" when it informed petitioner and the DEQ that permitting authority had been transferred to the Corps in June 1997, petitioner states that "Michigan issued a *final* Section 404 permit" in March 1995, leaving EPA with "no further role to play." Pet. 18. As the district court correctly recognized, however, the March 1995 proposed permit never became "final" because petitioner failed to sign the permit within the specified time. Pet. App. 13a; see C.A. App. 111 (March 1995 proposed permit states that the "permit shall become valid on the date of signature by the permittee"); *id.* at 101 (DNR cover letter states that "[t]his

permit is not valid until it is signed by the permittee"). Moreover, EPA's withdrawal of objections to the March 1995 proposed permit was made subject to the express "condition that the final permit not differ materially from this draft." *Id.* at 97. EPA stated at that time that "[i]f there are substantive changes to this draft decision by MDNR, we would need to review these changes to determine whether or not they are material to us." *Ibid.* EPA thus anticipated the possibility that further exchanges between petitioner and DEQ might result in additional amendments to the permit, and it made clear that any such changes would be subject to federal agency review. There is consequently no basis for petitioner's contention that EPA's conditional withdrawal of objections to the March 1995 proposed permit precluded the Corps from asserting authority over the Section 404 program after (a) petitioner refused to sign the proposed permit and (b) the DEQ issued a "state-only" permit containing substantially different terms.

The CWA provides that if the State fails to resubmit a permit to which EPA has objected, revised to meet EPA's objections within 30 days, "the Secretary [of the Army] may issue the permit." 33 U.S.C. 1344(j). The regulations similarly provide that "[i]n the event that the Director [of the pertinent state agency] neither satisfies EPA's objections or requirements for a permit condition nor denies the permit, the Secretary [of the Army] shall process the permit application." 40 C.F.R. 233.50(j). Because the "state-only" permit issued by the DEQ in this case did not conform to the objections previously expressed by EPA, the effect of the regulations was that permitting authority was transferred to the Corps by operation of law. Indeed, the DEQ permit itself made clear that it did not authorize work under

the CWA, see C.A. App. 123; Pet. App. 27a; pp. 7-8, *supra*, and the accompanying cover letter indicated that petitioner could "seek federal authorization for the project directly from the U.S. Army Corps of Engineers," C.A. App. 173. And in any event, the application to these unusual circumstances of a regulatory scheme that currently affects only two States (Michigan and New Jersey, see p. 4, *supra*) presents no issue of widespread or recurring importance.

4. The petition repeatedly suggests that EPA engaged in manipulative conduct in an effort to prevent petitioner from asserting its rights under state law. See, *e.g.*, Pet. 18 ("The agency's machinations scuttled [petitioner's] administrative appeal and takings action and forced the company to start the Section 404 process all over again."). The record does not support that assertion. Indeed, EPA had no apparent motive (legitimate or otherwise) for bringing the state administrative appeal to a halt.

As the district court explained,

> [petitioner's] administrative appeal under [state law] is an effort to change the limitations and conditions of the draft permit. If [petitioner] is successful in the administrative appeal, the end result will be a recommendation to the director of [the DEQ]. If the director accepts any changes recommended through the administrative proceeding, the permit which issued will contain different limitations and conditions than those to which EPA consented. Effectively, [petitioner] will not have a valid permit because EPA did not * * * approve it. The refusal to sign the draft permit vitiated the EPA's consent.

Pet. App. 4a-5a. Thus, if the state administrative appeal process had culminated in a decision favorable to

petitioner, EPA's earlier conditional withdrawal of objections to the March 1995 proposed permit would not have required the agency to accede to the State's issuance of a substantively different permit. As the district court recognized (*id.* at 16a-17a), the fact that Michigan's permitting process includes an administrative appeal mechanism does not alter the directive contained in 40 C.F.R. 233.50(j) that if the State ultimately fails either to satisfy EPA's objections or to deny the permit, authority to process the permit is transferred to the Corps.

There is also no basis for petitioner's repeated assertions (see, *e.g.*, Pet. 9-10) that the responsible federal and state agencies colluded to subject petitioner to an unfair result. The DEQ's reasons for granting a broad "state-only" permit are not altogether clear. The district court suggested that the State had "tak[en] a guarded approach to [petitioner's] takings action" because it had "recently suffer[ed] a huge verdict against it in a takings case." Pet. App. 16a. DEQ's issuance of the "state-only" permit had the effect, and perhaps the purpose, of reducing the State's potential exposure to takings liability by making clear that the federal government posed the only barrier to petitioner's proposed peat-mining activities. See *United States* v. *Bay-Houston Towing Co.*, No. 98-73252, 2002 WL 537630, at *30 (E.D. Mich. Mar. 13, 2002) (noting "the acute concerns in DEQ over the taking action in the Court of Claims and the desire of DEQ to issue a state permit to obviate any claim against the State of Michigan for a taking"). But whatever the reasons for the State's decision, the Corps' assertion of permitting authority was a reasonable response, and one consistent with the applicable provisions of the statutory and regulatory scheme.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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